

No. 12,534

IN THE

United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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FILED

AUG 6 - 1950

PAUL P. O'BRIEN, /
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STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the District of Hawaii appellant was charged with violating 26 U.S.C., Internal Revenue Code, sections 2553 (a) and 2593 (a), within the jurisdiction of that court. T 2-3. The district court had jurisdiction. 18 U.S.C., section 3231; Rule 18, Federal Rules of Criminal Procedure. On conviction thereof appellant was sentenced to imprisonment and fined by final judgment made and entered January 26, 1950. T 32-34. Notice of appeal therefrom was filed February 3, 1950. T 52-53. The appeal was timely. Rule 37 (a), Federal Rules of Criminal Procedure. Jurisdiction of this court to review the final

judgment of the district court is sustained by 28 U.S.C., Judiciary and Judicial Procedure, sections 1291, 1294.

STATEMENT OF THE CASE.

The indictment, filed September 15, 1949, contained two counts. T 2-4. The first count charged that on July 16, 1939, in the City and County of Honolulu, Territory of Hawaii, appellant violated 26 U.S.C., section 2553 (a), in that he "did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package". T 2. Said section 2553 (a) provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found. . . ."

That heroin and cocaine are drugs mentioned in 26 U.S.C., section 2550 (a), is not open to doubt.

The second count in the indictment charged that on July 16, 1949, in the City and County of Honolulu, Territory of Hawaii, appellant violated 26

U.S.C., section 2593 (a), in that he "being then and there a transferee required to pay the transfer tax imposed by Section 2590 (a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of marihuana and 35 marihuana cigarettes without having paid such tax".
T 3.

Said section 2593 (a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section.
..."

A jury found appellant guilty as to both counts on January 12, 1950. T 27. By judgment and commitment made and entered January 26, 1950, he was sentenced to imprisonment for 4 years and to pay a fine of \$1000 on the first count and to imprisonment for 2 years and to pay a fine of \$1000 on the second count, the sentences to imprisonment to run concurrently.

Appellant's arrest was preceded by a search warrant issued on July 12, 1949, to William K. Wells, a federal narcotic agent, authorizing him to search "a two story stucco building located at 803 Hausten

Street, Honolulu, T.H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Husten Street''. T 65-67. *According to the official Rent Control records of Honolulu, this building was owned by Edna D. Olson and the tenant thereof was Helen Thomas.* T 431-435. There was no driveway from Husten Street to the rear building. T 259. A tile wall 4 or 5 feet high enclosed both buildings. T 259.

And the search, made July 16, 1949, was preceded by elaborate plans and preparations on the part of narcotic agent Wells with the Honolulu police department cooperating. To locate the whereabouts of appellant a police officer was detailed on the morning of July 16 to watch the restaurant conducted by appellant on Smith Street. T 320, 338, 346-347. Appellant was not there. T 348. *Another police officer was detailed to watch appellant's residence at 408 Keonianu Street.* T 295-296. Appellant was not there. From 8:30 a.m. to 12:38 p.m. of July 16 narcotic agent Wells and 4 police officers stationed themselves in a building at 807-B Husten Street from which they could observe activities at 803 Husten Street. T 258, 273, 370. Between those hours they saw two children, a sister and a daughter of Helen Thomas, going in and out of the rear building at 803 Husten Street, riding around on a bicycle, and on one occasion one of the children returned to the building with a package wrapped in paper. T 260, 355, 371; they saw one Charles Montgomery drive up in a Packard automobile, park the car in front of 803 Husten

Street, and then enter the building in the rear. T 259-260; and at 12:38 p.m. they left the building at 807-B Hausten Street and went to the street below when they saw appellant walk out from the side of 803 Hausten Street and approach the automobile which Montgomery had parked. T 261, 330.

Narcotic agent Wells informed appellant of the search warrant, appellant said "OK", and the raiding or searching party, together with appellant, entered the living room of the house after the little daughter of Helen Thomas had unlatched the lock of a screen door. T 370-371. The members of the searching party did not agree as to where those inside the house were located at the time. According to narcotic agent Wells, Helen Thomas, her sister, and Montgomery were upstairs at the time. T 371. But according to one of the police officers, only Helen Thomas was upstairs at the time. T 275-277. In any event, Helen Thomas was brought down stairs before the search began and she and the two children remained seated on a couch in the living room during the greater part of the search. T 262-263, 274-276, 356, 371. Six additional police officers joined the raiding party during the progress of the search which began shortly after 12:38 p.m. and ended approximately at 3 p.m. T 263, 269-270, 294, 319-320, 377.

In chronological order, the search disclosed the following: (a) At 12:55 p.m., a police officer discovered a bottle containing 915 capsules filled with white powder under one of 3 concrete flagstones in a path-

way back of the rear house. T 263-264, 267, 270. A government chemist who analyzed a "certain quantity" from some of 10 capsules taken at random from this bottle said the quantity thus analyzed was heroin, a derivative of opium. T 393-394, 425; (b) shortly after 1:08 p.m., a police officer discovered a small bottle containing a substance having the appearance of Epsom salts under a pillow on a sun couch in a patio about 15 feet from where the first bottle was found. T 298-299, 309-310, 313. A government chemist who analyzed a "certain quantity" taken from this bottle said the quantity thus analyzed was cocaine, a derivative of coca leaves. T 394-395, 425; (c) a few minutes later, a police officer discovered a box containing 29 cigarettes and a brown paper bag containing a substance having the appearance of tea, jammed between a window screen and a shade on the outside of the building in the rear of the house. T 321-323. A government chemist who analyzed 3 of the 29 cigarettes said the 3 cigarettes thus analyzed contained marihuana. T 402-403. And the same government chemist, who analyzed 29.6 grains taken from the paper bag said the substance thus analyzed was marihuana. T 395; (d) and finally, a police officer who searched a couch or sofa in the living room after Helen Thomas, who was seated thereon, had been ordered off, discovered 6 cigarettes rolled up in paper under one of the cushions. T 327, 334-335, 339-341, 355-357. A government chemist who analyzed 3 of the cigarettes said the 3 cigarettes thus analyzed contained marihuana. T 398-399.

None of the articles discovered by the search bore narcotic tax paid stamps. T 403. After the indictment was returned (September 15, 1949) the collector made demand (September 27, 1949) upon appellant for production of the order forms required by 26 U.S.C., sec. 2591, respecting marihuana. T 2-4, 408-409. The forms were not produced. T 409.

As stated, the search began shortly after 12:38 p.m. and ended around 3 p.m. T 263, 269-270, 294, 319-320, 377. Appellant was not placed under arrest until 30 or 40 minutes after the search began, and the arrest occurred while rooms upstairs in the house were being searched and after both bottles earlier mentioned had been discovered. T 371, 384-385. Both before and after the arrest appellant was under restraint and was required to accompany narcotic agent Wells wherever the latter went on the premises. T384-385. Both before and after the arrest appellant was subjected to interrogation, and testimony respecting what he said and did was given at the trial as follows: (a) Before the arrest, when narcotic agent Wells placed on his tongue some of the contents from the small bottle, appellant said to Wells, "Man, don't do that, Billy; that's dynamite", and that appellant also said the bottle contained "more than" 200 grains. T 300-301, 328, 378; (b) after the arrest, and while the kitchen was being searched, appellant told Helen Thomas to go upstairs and get a key to a locked closet. T 376; (c) after the arrest, and while the kitchen was being searched, Wells asked appellant how long he had lived there,

and appellant said, "Oh, not very long". T 376; (d) in the kitchen, after the arrest, appellant referred to Helen Thomas and said to Wells, "Billy, you don't have to take her down; she doesn't know anything about this stuff", and when Wells said to appellant, "Well, then, is it your stuff?", appellant "just smiled and didn't reply". T 383; (e) at the police station after the arrest, and around 4:45 p.m. while police officer Kinney was interrogating appellant respecting two guns found during the search, appellant said, "I am responsible for everything that was found on the premises" and that appellant also said he had lived at 803 Hausten Street about two months prior to the arrest. T 413.

During the course of the trial appellant moved to strike all the testimony of Government witnesses relating to incriminatory acts and statement of appellant after the service of the search warrant. T 426. The motion was denied. T 431. A specification of error is addressed to this ruling. Appellant also moved to strike the testimony of officer Kinney relating to his conversation with appellant at the police station around 4:45 p.m. T 426-427. The motion was denied. T 431. A specification of error is addressed to the ruling. And appellant moved to strike the testimony of the collector concerning his demand on September 27, 1949, for production of the order forms required by 26 U.S.C., sec. 5591. T 427-428. The motion was denied. T 431. A specification of error is addressed to the ruling. A motion for judgment of acquittal as to

both counts of the indictment was made on the ground of insufficiency of evidence. T 428-430. The motion was denied. T 431. A specification of error is addressed to the ruling on each count. Another specification of error has reference to a new and superseding jury charge given by the court after jury deliberations had commenced.

SPECIFICATION OF ERRORS RELIED UPON.

1. The district court erred in denying appellant's motion for judgment of acquittal as to the first count of the indictment.

2. The district court erred in denying appellant's motion for judgment of acquittal as to the second count of the indictment.

3. The district court erred in denying appellant's motion to strike the testimony of deputy collector Patterson respecting demand made upon appellant on September 27, 1949, to produce order forms required by 26 U.S.C., sec. 2591, which motion was made on the ground that demand was not made until after the indictment had been returned against appellant.

4. The district court erred in denying appellant's motion to strike the testimony of government witnesses relating to incriminatory acts of, and conversations with, the appellant after service of the search warrant, which motion was based on the ground that

appellant was under illegal restraint after such service and not acting freely and voluntarily.

5. The district court erred in denying appellant's motion to strike the testimony of officer Kinney as to a conversation with appellant at the police station regarding guns, which motion was made on the ground that the conversation was irrelevant and immaterial.

6. The district court erred to the prejudice of appellant, and appellant was denied a fair trial, by the court denying the request of the jury during its deliberations for a transcript of the instructions given, and by giving in lieu thereof a new and superseding jury charge wherein the bounds of proper comment by the court were exceeded.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.

At the close of the Government's case, appellant moved for judgment of acquittal (directed verdict) as to the first count of the indictment on the following grounds (T 428-429):

“We move for a directed verdict now, if the Court pleases, as to both counts, for the reason that there is absolutely no direct evidence as to the violation of the defendant, that the only evidence which the Government has tried to produce, as was admitted by the Government during

the argument on the motion for a bill of particulars, was the presumptions arising from possession, and the Government has failed to show that on July 16, 1949, the defendant was found in possession of any of the articles mentioned in either count of the indictment, for the reason that possession, to be incriminatory, must be personal and exclusive, neither of which has been shown by the Government.

We make a specific motion for a directed verdict as to Count 1, if the Court pleases, in addition to reasons given on the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 1 for the reason that there is a variance between the indictment and the proof, for the reason that there is no evidence that defendant was found in possession of any of the articles mentioned in said count, nor that the said articles did not come from an original stamped package, for the reason that the evidence is silent as to any purchase by the defendant of these articles as is charged in the indictment, and is silent as to any dealings therein; that the so-called presumption of the statute is not a presumption by (but) a rule of evidence shifting the burden of going forward. It is not evidence of an act which the jury must find beyond all reasonable doubt, to wit, that the defendant did, in fact, purchase these articles on or about July 16, 1949. And for the further reason that the evidence, giving the Government every possible and conceivable benefit, at best raises two theories, one consistent with innocence, the other with guilt, and under the law the

theory consistent with innocence must be accepted by the Court."

The court denied the motion. T 431. It should have been granted. The first count of the indictment was based on 26 U.S.C., sec. 2553 (a), earlier quoted, and it charged appellant with the unlawful *purchase* of heroin and cocaine which was neither in nor from the original stamped package. No witness testified at the trial that appellant ever purchased heroin or cocaine from anyone. Said section 2553 (a) provides, however, that "the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of violation of this subsection *by the person in whose possession same may be found*". (Emphasis added.)

On the record before the court there was enough evidence to support a finding that at least some quantity of heroin and cocaine was found on the premises at 803 Hausten Street. There was also enough evidence to support a finding of the absence of appropriate tax paid stamps from the drugs thus found. The vital question here, obviously, is whether such drugs were found in the possession of the appellant. If there was not enough evidence in the record to support a finding that the drugs were in the possession of the appellant, it must therefore follow inevitably that the evidence was insufficient to support a conviction on the first count and the court erred in denying the motion for judgment of acquittal as to that count.

In the record before the court there is evidence, adduced by the government, that appellant's residence was at 408 Keanianu Street, Honolulu. T 295-296. And there is evidence, adduced by appellant, that 803 Hausten Street was rented to Helen Thomas and not to appellant. T 431-435. It is clear from the record that Helen Thomas, her little daughter, and her little sister were living at 803 Hausten Street and were on the premises at the time of the search. Fairly considered, the foregoing state of the record therefore impels a conclusion that any drugs found on the premises at 803 Hausten Street were in the possession of Helen Thomas and not appellant, and that the statutory inference permitted by said section 2553 (a) has application to Helen Thomas and not to appellant.

But from the statement of the case herein it will be obvious to the court that the government sought to bring appellant within the scope of the statutory inference by testimony of confessions or admissions made by him before and after arrest. In other subdivisions of this brief appellant challenges the rulings of the court denying his motions to strike such testimony. At this place appellant points out that such confessions or admissions stand uncorroborated in the record and that under settled law they were therefore inadequate to support or sustain a conviction on the first count of the indictment. *Warszower v. United States*, 312 U.S. 342, 345-348, 61 S.Ct. 603, 605-607, 85 L.Ed. 876; *Ercoli v. United States*,

C.A.D.C., 131 F. 2d 354, 356-357; *Forte v. United States*, C.A.D.C., 94 F. 2d 236, 243-244.

Accordingly, the court erred in denying appellant's motion for judgment of acquittal as to the first count. It is true that in moving for judgment of acquittal counsel for appellant used the term "directed verdict" instead of "judgment of acquittal". But that was an irregularity which must be disregarded. Rule 52 (a), Federal Rules of Criminal Procedure. It is also true that the motion was made at the close of the evidence offered by the government, T 426-431, and was not repeated or renewed *in terms* at the close of all the evidence. T 437. But it was repeated or renewed *in substance* by the following instruction requested at the close of all the evidence and which the court denied (T 50):

"Instruction No. 1

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count I.

Denied.

/s/ J. F. Mc."

SPECIFICATION OF ERROR NO. 2.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S
MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SEC-
OND COUNT OF THE INDICTMENT.

At the close of the Government's case, appellant moved for judgment of acquittal (directed verdict) as to the second count of the indictment on the following grounds (T 429-430):

“We move for a directed verdict as to Count 2, if the Court pleases, in addition to the grounds given as to the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 2 for the reason that there is no direct evidence that the defendant was a transferee or required to pay the tax, nor is there any evidence that the defendant was found in possession of any of the articles mentioned therein, that there is no proper evidence as to the demand by the Collector to produce the order forms; and, of course, if my motion to strike Mr. Patterson’s testimony is granted, there is no evidence at all of the demand and therefore no presumption whatsoever; that the presumption, if any, is not evidence of a fact, which the jury must find beyond all reasonable doubt, to wit, that the defendant was in fact a transferee and required to pay the tax. Giving the Government’s evidence every possible benefit, the evidence at best raises two theories, one consistent with innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.”

The court denied the motion. T 431. It should have been granted. The second count of the indictment was based on 26 U.S.C., sec. 2593 (a), earlier quoted, and it charged appellant with unlawfully acquiring or obtaining marihuana without having paid the required transfer tax. T 3. No witness testified at the trial that appellant ever acquired or obtained any marihuana. Said section 2593 (a) provides, however, that “proof that any person shall have had in his

possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of such guilt under this section”.

What was said under Specification of Error No. 1 respecting insufficiency of evidence and form of motion is equally applicable to Specification of Error No. 2 and need not be repeated. The instruction which the court denied at the close of all the evidence was as follows (T 50):

“Instruction No. 2

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count II.

Denied.

/s/ J. F. Mc.”

Here, as there, the conclusion is impelled that the court erred in denying the motion for judgment of acquittal.

The ruling of the court denying appellant's motion to strike the Patterson testimony mentioned by appellant's counsel in presenting the motion for judgment of acquittal as to the second count is the subject of Specification of Error No. 3. The Patterson testimony had reference to demand by the Collector upon appellant to produce the order forms required by 26 U.S.C., sec. 2591.

SPECIFICATION OF ERROR NO. 3.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT ON SEPTEMBER 27, 1949, TO PRODUCE ORDER FORMS REQUIRED BY 26 U.S.C., SEC. 2591, WHICH MOTION WAS MADE ON THE GROUND THAT DEMAND WAS NOT MADE UNTIL AFTER THE INDICTMENT HAD BEEN RETURNED AGAINST APPELLANT.

At the close of the testimony offered by the Government the following motion was made by appellant (T 427-428) :

“We move to strike the testimony of Mr. H. A. Patterson, if the Court pleases, in which he testified concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30 to produce those forms, for the reason that the demand was made after the indictment was returned by the grand jury; and, even though Mr. Patterson may himself not have known that an indictment had previously been brought, the demand was made in the presence and at the request of Mr. Wells, who knew that the indictment had, in fact, been returned; for the further reason that at the trial of the case the only evidence of nonpayment of the tax was Mr. Patterson's testimony, which was not and could not have been available to the grand jury, and hence at the time of the indictment there was, in fact, no evidence of any violation of the law; for the further reason that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances; and for the further reason that the demand having

come after the indictment was in effect required the defendant to give testimony against himself; and for the further reason that there is no evidence that Mr. Patterson in any way informed the defendant as to the law and the requirement that such forms be produced or the effect of such failure."

The Patterson testimony to which the motion to strike was addressed appears in the record as follows (T 408-410):

"Q. Mr. Patterson, you are familiar with the marihuana order forms which are mentioned in Section 2593 Title 26, U.S.Code?

A. Yes, sir, I am.

Q. Did you at any time make demand on the Defendant for production of such order forms covering the marihuana which was picked up at 803 Hausten Street on July 16, 1949?

A. Yes, sir, I did.

Q. And where did you make such demand?

A. On the date of September 27th at 8:20 p.m.

Q. Where did you make such?

A. In the premises of Helen's Sweets Shop.

Q. And did he produce those order forms at that time?

A. No, sir, he did not.

Q. Did you give him a time within which he should produce them?

A. I gave him until the close of business September 30th to produce it in the field office to me.

Q. And did he produce them?

A. No, sir, he did not. * * *

The Court. * * * What was the date on which you made the demand on him?

The Witness. September 27th, sir.

The Court. 1949?

The Witness. Yes.

The Court. You gave him until the close of business of what?

A. September 30th.

Mr. Hoddick. And this all took place in 1949?

The Witness. Yes. * * *

By Mr. Landau. Q. Do you know, Mr. Patterson, whether or not at the time you made the demand on September 27th that the defendant had already been indicted for this offense?

A. No, sir, I did not.

Q. Do you now know that at the time you made the demand he had already been indicted?

A. Yes, sir.

Q. Who was with you at the time that you made the demand, Mr. Patterson?

A. The demand was made in the presence of Mr. Wells.

Q. And at the request of Mr. Wells?

A. At the request of Mr. Wells."

The court denied the motion to strike this testimony. T 431. It should have been granted. Appellant was arrested July 16, 1949. T 371, 384-385. He was indicted September 15, 1949. T 2-4. The collector's demand was made September 27, 1949. Between arrest and indictment there was ample time to make the demand. Under such circumstances appellant respectfully submits that demand made after indictment was unreasonable as a matter of law and inadequate

to evoke the statutory inference permitted by 26 U.S.C., sec. 2593 (a).

That prejudice resulted from the denial of the motion to strike is obvious, for in the absence of reasonable demand foundation for the statutory inference did not exist.

SPECIFICATION OF ERROR NO. 4.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

At the close of the testimony offered by the Government, the following motion was made (T 426):

“The defense now moves, if the Court please, to strike all the testimony of Government witnesses relating to acts of, and conversations with, the defendant that are in any way incriminatory which occurred after the service of the search warrant at 803 Hausten Street, for the reason that at the time of the search and investigation thereafter the defendant was then under illegal arrest, and hence anything that was said by him or done by him is presumed to have been done or said under duress and not free and voluntary.”

The Court denied the motion. T 431. The testimony to which the motion was directed appears in the record as follows:

Narcotic agent Wells (T 378, 383, 375-376):

“Q. Did you receive anything from Officer Case?

A. I received a bottle from Officer Case. I took the cork out.

Q. Where did you receive it?

A. In the kitchen, in the house in the rear of 803 Hausten Street. And I put a little of the contents on my tongue. The Defendant said, ‘Man, don’t do that, Billy; that’s dynamite.’

Q. What did you do with the bottle after that?

A. And I said, ‘This bottle must contain about 200 grains.’ The Defendant said, ‘No, more than that.’ ” * * *

“Q. Did you take Mrs. Thomas down to the police station with you?

A. Yes, sir.

Q. Did the Defendant say anything concerning that?

A. Oh, while in the kitchen he told me in the kitchen, he said, ‘Billy, you don’t have to take her down; she doesn’t know anything about this stuff.’ I said, ‘Well, then, is it your stuff?’ He just smiled and didn’t reply.” * * *

“Q. And then?

A. Then I went back to the kitchen, proceeded to search the kitchen, and then I asked the Defendant if he had the key to the door of a closet which led underneath the stairway.

Q. And what did the Defendant say?

A. Well, he said you can’t—he didn’t have it. So I told him that I have to search that closet, I had a search warrant. He then told Mrs. Thomas to go upstairs and get the key, which she did, and

came back and handed it to me, and I opened the door, went in and proceeded to search the closet.

Q. Did you find anything in the closet?

A. I found a loose panel in the closet?

Q. Did you speak to the defendant about this loose panel?

A. Yes, sir, I said to the Defendant, 'Shorty, this is a good plant, but it's empty.' He said it was there before he moved in.

Q. Did that mark the completion of your search of the premises?

A. Yes, sir.

Q. What did you do then?

A. Then I came to the kitchen to wash my hands. I had a conversation with the Defendant. I said to the Defendant, 'Shorty, you have a nice place here. How long have you been living here?' He said, 'Oh, not very long.' " * * *

Officer Case (T 300-301):

"Q. * * * Did Mr. Wells ever give the bottle back to you after you handed it to him in the dining room?

A. Oh, yes, sir, immediately after. He looked at the bottle and asked Mr. Henry what he estimated that to be. He said about—Mr. Wells said, 'This is about 200 grains, don't you think so, Henry?'

Q. What did Mr. Henry say?

A. 'More than that.' So Mr. Wells pulled the bottle stopper out and dipped his finger into the contents of it and rubbed it on his tongue.

Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything?

A. Yes, sir.

Q. What did he say?

A. He said, 'Man, that is dynamite. Billy, you know better than that.' "

Officer Ferry (T 328):

"Q. Now, during the time that you were at 803 Hausten Street, Mr. Ferry, did you hear the defendant say anything?

A. Yes, when I went back in to bring the two contents over to Lieutenant Fraga, Mr. Wells was at that time testing the white powdered substance in the bottle that was discovered by Mr. Case, and if I remember correctly, the defendant, when Mr. Wells tasted some of it and rubbed it on his tongue, Mr. Henry said something, 'You know better than that. That's dynamite,' or something, words to that effect.

Q. Did you hear him say anything else during the course of the search?

A. Mr. Wells said, 'There is about 200 grains of something in there,' and Mr. Henry said, 'More than that,' or something like that."

As disclosed by the statement of the case herein *eleven officers* including narcotic agent Wells participated in the raid or search, and both before and after an arrest without warrant appellant was under restraint and was required to accompany Wells wherever the latter went on the premises. Logic will not permit it to be said that acts done or statements made by appellant under such circumstances were free or voluntary. *United States v. Baldocci*, D.C.Cal.,

42 F. 2d 567, 568. That the ruling of the court denying the motion to strike, was prejudicial error, may not be doubted under the decision of the Supreme Court in *Upshaw v. United States*, 335 U.S. 410, 411-414, 69 S.Ct. 170-172.

SPECIFICATION OF ERROR NO. 5.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION REGARDING GUNS, WHICH MOTION WAS MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

At the close of the testimony offered by the Government, the following motion was made (T 426-427):

“Move to strike the testimony of Officer Kinney, if the Court pleases, especially that portion of his testimony in which he testified about a conversation between himself and the defendant at the vice squad room, on July 16, 1949, at or about 4:45 p.m., wherein the defendant is alleged to have stated that he was responsible for everything at 803 Hausten Street, for the reason that, as Mr. Kinney testified, he was then conducting an investigation concerning certain guns, and the questions put to the defendant and the defendant's answers thereto related specifically to those guns and hence could have no possible bearing on, or admissible as an admission in this case, or to any matter which was not then under investigation by Mr. Kinney.”

The court denied the motion. T 421. It should have been granted. The testimony to which the motion was addressed appears in the record as follows (T 412-413, 419-420) :

“Q. And where did you have this conversation with the Defendant?

A. At the vice room in the Honolulu Police Department.

Q. And approximately what time?

A. Approximately 4:45 in the afternoon.

Q. That was on July 16, 1949?

A. Yes, sir.

Q. And at that time did the Defendant say anything to you concerning the various articles which were found at 803 Hausten Street?

A. Yes.

Q. What did he say?

A. He said that everything that happened out at the premises at 803 Hausten Street ‘I am responsible for.’ And everything that was found on the premises. * * *

A. ‘Everything that was found on the premises at 803 Hausten Street I am responsible for.’ * * *

Q. Will you relate to the Court and Jury, Mr. Kinney, what else you heard the Defendant say down at the police station on July 16, 1949?

A. The Defendant stated, said that he was living at 803 Hausten Street. * * *

Q. Did he say how long he had been living there?

A. About two months prior to the arrest.” * * *

“Q. Now, as a matter of fact, Mr. Kinney, this conversation that you had down there with

Mr. Henry was in the course of your investigation concerning the possession of a gun?

A. Two guns.

Q. * * * But that is what your investigation concerned itself with, isn't that right?

A. Yes, sir.

Q. And you knew that when Mr. Henry was answering your questions he was answering the questions with reference to the subject matter of your investigation.

A. Well, he was answering questions in general. The questions I was putting across to him was in general. I mean the whole thing that happened out at Hausten Street.

Q. With reference to the items which you were investigating, isn't that correct, Mr. Kinney?

A. Yes, I was talking about guns, but—
* * *

A. —but this statement he had given to me was given voluntarily by him."

Fairly considered, it is obvious that the officer was interrogating appellant respecting guns and appellant was answering respecting guns and nothing else. The officer's testimony was therefore irrelevant and immaterial and the court erred in denying the motion to strike. The ruling was prejudicial because the testimony invited and permitted false inferences against appellant.

SPECIFICATION OF ERROR NO. 6.

THE DISTRICT COURT ERRED TO THE PREJUDICE OF APPELLANT, AND APPELLANT WAS DENIED A FAIR TRIAL, BY THE COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATIONS FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING IN LIEU THEREOF A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED. (See Appendix for new and superseding jury charge and exceptions thereto.)

The jury interrupted its deliberations to request a transcript of the instructions that had been given. T 473. The court denied the request. T 478. In lieu thereof it gave a new and superseding jury charge. T 477-497. Inclusion of this jury charge in the above Specification of Error would be impractical, and it is therefore printed in an Appendix to this brief. A supplemental instruction removed the basis for the exception to the part of the charge which stated that "neither the defendant nor the Government has produced Mrs. Thomas". T 493, 501-502.

This new and superseding charge was accompanied and emphasized by writings and diagrams made on a blackboard by the trial judge. T 481. Fairly considered, it was virtually another argument for the prosecution. It overstated the case of the government; it understated and belittled the case of the defendant.

In reviewing the testimony upon which the government relied, the court said narcotic agent Wells testified he searched "defendant's bedroom" at 803 Haus-ten Street. T 487. According to the record, defendant's counsel objected to this conclusion of the witness, and

although the court did not directly rule on the objection, a ruling sustaining the objection was tacit. T 372. The court said Wells testified he arrested defendant as "they were going downstairs" in response to a call by Sasaki that he had found something. T 487. According to the record, Wells testified he arrested defendant in an upstairs bedroom 30 or 40 minutes after the search warrant was served. T 384. The record has it that the search warrant was served after 12:38 p.m. (T 370-371), and that Sasaki made his discovery at 12:55 p.m. (T 270). The court also said Wells testified that when he asked defendant if certain "stuff" was his, the defendant "shrugged his shoulders and smiled". T 489. The Court supplied the shrugging of the shoulders, for the testimony of Wells is plain that defendant "just smiled". T 383. And in reviewing the government's case the court made no mention of the testimony of a government witness that appellant's residence was at 408 Keanianu Street. T 295-296.

Comments of the court upon the defendant's case are quoted (T 492-493):

"The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe,

and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence was the record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station."

In *United States v. Marzano*, 2 Cir., 149 F. 2d 923, it was said, at page 926:

"Despite every allowance, he (the trial judge) must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

From the many cases applying this same rule the following may be cited: *Quercia v. United States*, 289 U.S. 466, 468-472, 53 S.Ct. 698, 699-700, 77 L.Ed. 132; *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919,

923-924, 38 L.Ed. 841; *Musick v. United States*, 6 Cir., 2 F. 2d 710, 711; *Hobart v. United States*, 6 Cir., 299 F. 784, 785.

When tested by the rule of the foregoing cases, the conclusion cannot be avoided that appellant was denied a fair trial by the new and superseding jury charge given by the trial judge in the present case.

CONCLUSION.

Appellant therefore respectfully submits that judgment and sentence should be reversed as to each count.

Dated, San Francisco,
August 7, 1950.

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W. Z. FAIRBANKS,
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(Appendix Follows.)

Appendix.



APPENDIX FOR SPECIFICATION OF ERROR NO. 6.
(New and Superseding Jury Charge)

January 11, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Last evening at approximately 11 I sent the jury to retire under the supervision and in the custody of the Marshal. All twelve of them are now present. I trust that they have had a good night's sleep.

Before directing them to resume deliberations, I want to come now to the second request which the jury made last evening in addition to permission asked relative to retirement.

The second request was, as you all remember, that there be made available to the jury this morning a

transcript of the Court's instructions, and as I indicated last evening at the late hour, (1) it was not physically possible to have a transcript of the instructions prepared by this morning, and (2) even if it were, I was not sure that I would give you those instructions in written form. As I indicated, or intimated, last evening, in lieu thereof I am going to go over the instructions this morning in my own language and words. I am also going to review some of the evidence for you, but as I do, I want you to bear in mind, as I have told you before, that, though I have the right to comment upon the evidence, I [258] will endeavor to refrain therefrom; but, in any event, should I go over the line and tend, in your opinion, to comment upon the evidence, I want you to remember that it is not what I think or what my opinion may be, but a question to be decided by you. The evaluation of the evidence, the recollection of the evidence, and the findings of fact from the evidence which you are to make are exclusively within your province, and you are to disregard any opinion that you might think that I have.

Similarly, as I review some of the evidence, again it is not what I recall, it is what you recall that the witnesses actually said.

Now, I spent some hour or more yesterday reading to you instructions that the attorneys on both sides requested that I give you. In addition, I gave you some fundamental, basic instructions of my own, and I analyzed the statutes, two in number, that relate to the two counts of this indictment, in my own

language. It occurs to me overnight that between the language that I used and the language that I was requested to read to you that there was probably too much lawyer's language in there for you to digest as readily as we lawyers are able to digest such language, and, I have been told very definitely by the Supreme Court of the United States, instructions are for the purpose of helping the jury understand the law in plain, ordinary language so that they can apply it. So it is because I feel that I have been remiss [259] in reducing that law to plain, simple language that I am going to review the substance of my instructions this morning. Before I do so, let it be recorded that with regard to anything and everything I say the defense may have full and complete exceptions. I do not want to be interrupted during the time that I am talking, but at the conclusion of my remarks I will give you ample opportunity to except to anything I do or say, so if you will make notes of what you want to object to, I will give you ample opportunity. I do not accord that same privilege to the Government, because it hasn't the privilege of taking the exceptions to what I say, or if it does, it doesn't do it any good.

As mentioned yesterday by the attorneys and as stressed by the Court, reduced to its simplest language, this case boils down to a question for you to determine as to whether or not the defendant had possession, actual or constructive, of the narcotics, drugs, alleged in the two counts of this indictment. That is the pivotal, basic question.

It is relatively a simple question, but it is one which must be decided upon the evidence which you gentlemen have heard here in court in this case, and upon nothing else. As I talk to you this morning, I want you continually to bear in mind what I have told you before, and what I am saying is simply to better enable you to understand what I have said before, for I am not going to say anything different. I am simply [260] saying it in my own language, which I hope will be a bit clearer than the language which I used yesterday.

I simply, therefore, recall to your minds that which remains true, that in this, as in any criminal case, the burden of proof to prove all of the necessary factors to constitute the offense is upon the Government, and that burden of proof does not shift. I have talked yesterday and will today talk about a different kind of a burden, which does not disturb the ultimate burden of proof. This other burden that I have spoken of and do refer to and will explain in greater detail later is simply the burden of going forward with the evidence. Those are technical, legal terms, but I think I can make it clear to you what I mean. I repeat, the burden remains on the Government throughout the case from the beginning to the end. Also, this very real, substantial presumption of innocence surrounds the defendant and remains with him until by the evidence, as measured and tested by the law, you are, if you are, satisfied beyond a reasonable doubt of his guilt as charged.

Let us take up the subject of the law once again as to counts 1 and 2. In order for you to understand it better I will draw you, as I have had to do for myself, a diagram. Mr. Clerk, you make a copy of what I put on the board so that you have a record of it.

The Clerk: Yes, your Honor. [261]

The Court: Count 1 of the indictment, you will recall, deals with two kinds of drugs, heroin and cocaine, and it is alleged by the Government that the defendant purchased a certain quantity of heroin and cocaine.

Now, under the statute, which I have read to you before, and repeat again, it is provided by law that "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a)"—and that includes heroin and cocaine—and remember he is simply charged with purchase—"except" the statute goes or "in the original stamped package or from the original stamped package; * * *" Now, "original stamped package or from the original stamped package" means this: "stamped" refers to Internal Revenue stamps required to be placed upon drugs and the tax paid upon their value in accordance with the statute; and "the original stamped package" means the original package from which they came from the factory; "from the original stamped package" means when they are lawfully dispensed pursuant to prescriptions by a doctor or otherwise directly to a patient from an original stamped pack-

age. You will remember that I mentioned that yesterday, as those are exceptions to the statute, namely, prescriptions and dispensations directly by doctors to patients.

Now let us read this again:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; . . .”

And the statute goes on and says:

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . .”

Now, what does the Government have to prove under count 1? It must prove the nature of the drug. There is no dispute in this case that the drugs in evidence are cocaine and heroin.

They must prove that the defendant, as charged, purchased those drugs and at the time of purchase the purchase was not in or from an original stamped package.

As I told you yesterday, we haven't heard a word in this case about purchase. We have heard about whether or not these drugs have Internal Revenue stamps upon them or the containers. There are no Internal Revenue stamps upon these drugs, indicating they were tax-paid. The Government has to prove, as it has, the absence of tax-paid stamps. There is no dispute about that.

Now the Government also has to prove that the defendant had actual or constructive possession of these drugs upon which there were no tax-paid stamps.

I have told you the Government has proven the absence of [263] stamps. Here is the pivotal question: possession.

A Juror: May I sit here. I can't see.

The Court: Certainly. Can you see?

Mr. Landau: I believe I can see all right, your Honor.

The Court: Now, if by the evidence the Government has proved to your satisfaction beyond a reasonable doubt that the defendant, as charged, did have possession of these drugs, there then arises under the law, pursuant to another rule of law, what to the law is known as a presumption of fact, which is a reputable presumption, placing the burden of going forward and explaining satisfactorily that possession as being either lawful, or innocent, or unconscious; lawful, by proving, for example, that it was lawfully acquired; innocent, that nothing was known about it, or that the person didn't know they were drugs; that somebody put them in his pocket and, unknown to him, he was unconscious of carrying them around or having them in his possession. The law then provides that unless that possession is satisfactorily explained, if it is not, then there arises a proposition that that presumption proves and takes the place of independent evidence to prove these two missing links and warrants a conviction.

So you see, as we have said to you, the lawyers and I, the pivotal question is possession. That is how the statute works.

The operation of the other statute under marihuana act [264] is quite similar. I will just run over it briefly. In essence it is the same. The Government, under this second count has to prove the nature of the drug, which it has proved, and as to which there is no dispute. It has to prove that the defendant was a transferee required to pay the tax imposed on transferees of marihuana. You know what the word "transferee" means. If you transfer something to me, I am the transferee and you are the transferor.

The Government must also prove that the defendant acquired this drug without having paid the tax, and if the Government additionally proves that the defendant possessed the drug and failed after reasonable notice and demand by the Collector of Internal Revenue to produce the order form covering it and required by law to be retained by the transferee—I will just abbreviate that on the board. I repeat, if the Government proves possession and proves also beyond a reasonable doubt the failure of the possessor to produce, after a proper demand, the order form covering that drug, then there arises a presumption, which is reputable, if the defendant in the face of such wishes to go forward and explain that possession, and that presumption, unless explained to your satisfaction, as in the other statute, takes the place of independent, direct proof of these

second and third steps that I have outlined, namely, as the statute says:

“ . . . proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order [265] form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a). ”

Now, that is, once again, how the statutes operate. Boiled down, in essence the law is that anyone having been proven to be in possession of any drugs has the burden of explaining satisfactorily that possession as being lawful, innocent, or unconscious.

Now, what is the evidence as to possession? For in count 2, like count 1, the pivotal fact which you must be able to find beyond a reasonable doubt to exist upon the evidence, is the fact of possession.

Upon what evidence in this case does the Government rely and contend on the basis of which it has proven to your satisfaction beyond a reasonable doubt the defendant had possession? The evidence is all circumstantial save and except as there may be found by you to be any admissions made by the defendant by word or act.

You will remember the definitions which I gave you yesterday of direct and circumstantial evidence, and that circumstantial evidence, to be of merit, must be consistent with each other, various things established by the circumstantial evidence must be

consistent and consistent with no other hypothesis except that of guilt. [266]

You will remember also the ways in which I defined for you the meaning of the term "reasonable doubt." Just briefly, that must be a doubt based upon reason; that it is not an imaginary, speculative doubt; that it may be a doubt created by the lack of evidence or by the evidence itself, but it is a doubt which is based upon reason, and that you are satisfied beyond a reasonable doubt or beyond all reasonable doubt when you are satisfied to a moral certainty.

The evidence upon which the Government relies, as I recall it—and I repeat, it is not what I recall, it is what you recall—but, as I understand it, the Government relies upon the fact that it served a search warrant upon the defendant. You will recall Mr. Wells' testimony that as he approached the defendant and informed him that he had a search warrant for the defendant's premises. The defendant, as I recall the testimony from Mr. Wells, said "OK," or words to that effect, and he and the officers, with Mr. Wells, then went to the rear house at 803 Hausten Street here in the City and County of Honolulu. When they got there, the door through which they wished to enter apparently was latched, or locked, or something; in any event, the testimony is that the defendant called to someone inside to free the door in some way so that the people could come in; that they did go in; that there in the living room, Mr. Wells testified, he served the search war-

rant upon the defendant and, as required, undertook to read [267] the search warrant to the defendant. The defendant waived the reading of the search warrant.

Mr. Wells further testified about proceeding upstairs and searching a bedroom, which he said was the defendant's bedroom, which he later also called the mauka bedroom.

Wells further testified that after he was called downstairs by Sasaki to see something found upon the search of his assistants, such as was Sasaki, as they were going downstairs, the defendant being with Wells, Wells placed the defendant under arrest.

The Government further, as I understand it, relies, for whatever value it may have, upon a statement made by the defendant to Wells at the time Wells was estimating the grainage content of that small white bottle, which I understand is cocaine. You will recall Wells testified that he estimated it contained about 200 grains, and the defendant ventured the opinion that it contained more than that, or words to that effect.

Then you will recall the Government relies on another element relating to a closet which Wells testified he wished to search. Upon finding it locked, Wells called upon the defendant for the key. Wells testified that the defendant indicated negatively as to the key. I am not saying one way or another just what the defendant said; that is for you to recall. But there was some problem about the key; let's put [268] it that way, the problem being solved,

according to Wells' testimony, by the defendant's calling upon Mrs. Thomas to produce the key, which was produced. The key fitted the door, the door was unlocked, Wells found inside there something which caused him to make a remark which you will recall, to which the defendant, according to Wells, replied, "That was there when I moved in." I think they called that a panel. I will just put the word panel down there as indicative of what I am referring to. It is for you to remember actually what it was.

Next, the Government places some reliance upon the fact that Wells testified at a point of time near the end of the search he was washing his hands in the kitchen and he remarked to the defendant that he had a nice place here and asked him how long he had been living there, to which the defendant made a reply. What the defendant said you know as well as I. I will label that "washing of the hands incident."

Next, I understand the Government to be placing reliance upon what, at or about that same time that I have just referred to, the defendant said and did with reference to Wells, and to be placing reliance upon it despite the fact that at the time the defendant was then and there under arrest. As I have told you, the law is that a person under arrest is not required, and cannot be compelled, to do anything or say anything that may in any way incriminate him, but that, however, [269] the fact that a person may be under arrest does not preclude him from freely and voluntarily, without compulsion or coercion,

doing or saying anything that he may wish to say. Whether these things that followed the time or arrest were free and voluntary acts of the defendant is for you to decide. The incident that I was about to come to as being the next item upon which I understand the Government relies is the fact that the defendant came to Wells making representations to him that Wells shouldn't take, or need not take, Mrs. Thomas, who was found on the premises, to the police station, or take her somewhere in custody, for the reason that she knew nothing about this stuff. I don't purport to be quoting the defendant's exact words. That is the substance of it, as I recall it; it is for you to recall exactly. Whereupon, Wells asked the defendant whether or not then this stuff was his. Wells testified at that point that the defendant shrugged his shoulders and smiled. Does that have any significance? That is for you to determine. We will put down, for lack of a better label, as the smile and shrug.

Next I understand the Government to rely upon the testimony of Sergeant Kinney. I believe it is sergeant; I don't know what the rank is. But you will recall that his testimony was that on this same day in question, that all of the witnesses had been talking about, at the police station, to which the defendant had by Wells been taken under arrest, [270] Kinney talked to the defendant and the defendant talked to him, and that they were talking about guns. Why they were talking about guns we don't know; it is none of our concern; guns are not a part

of this case. But the testimony of Kinney is that they were talking about guns, and, as they did, Kinney says the defendant said to him that he was responsible for everything that was found there and that he had lived there approximately two months. What was the defendant talking about? What did the defendant mean? What is its weight, significance and value in conjunction with the other things upon which the Government relies is for you to determine, not me.

You will also recall that this same witness Kinney testified that he did not so testify at some proceeding in the district court or police court, the exact nature of which we know not what it was, and it is of no concern to us; but that whatever the proceeding was he did not give this information at that time to Counsel who was questioning him on the subject of whether he knew, or not, where the defendant lived. His answers to the questions along that line, you will recall, were, in substance, to the effect that he didn't so testify because he was not asked. How much weight you are going to place on Sergeant Kinney's testimony is for you to determine, tested and measured by the various tests and measurements I have given you as applicable to all witnesses.

Now, there may be other things that the Government relies upon to establish this fact or possession and as claiming on the basis of which they have proven beyond a reasonable doubt that the defendant had possession, I don't know, but those are the things that occur to me that they are relying upon.

I may be mistaken; there may be more or less. It is for you to determine. In any event, there is no reliance or contention made, as I understand it, by the Government that the defendant was in actual, physical possession of these drugs, such possession as I have of this piece of chalk that I have in my hand.

Their contention and argument seems to be that, putting all of these things upon which they rely together and taking all of the evidence into consideration, they believe that by circumstantial evidence and by acts and actions of the defendant they have, they claim, proven to your satisfaction beyond a reasonable doubt that the defendant did have possession and, if they have, there is a burden of going forward as a matter of law, upon the defendant to explain that possession. That is the Government's contention. Whether the Government is right or not, you, and only you, know and can determine.

What do we have on the other side of the picture? We have, first and foremost, the proposition of law that I have told you about, that the defendant is presumed innocent, that [272] he doesn't have to testify in his own behalf, and that no adverse inference may be drawn by you from the fact that he does not testify. You may ask, How is that so if he has the burden of going forward with the evidence to explain possession if we should find from the evidence beyond a reasonable doubt that he did have possession? The answer to that is: The de-

fendant may testify if he wants to, or he may call others to testify for him and to explain that possession, or he may be satisfied that the Government hasn't proved beyond a reasonable doubt to your satisfaction that he did have possession, and he is willing to take the risk of the opinion that he has to explain anything.

The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe, and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence that Mrs. Thomas was the [273] record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested

at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station.

Neither the defendant nor the Government has produced Mrs. Thomas. As to the weight and significance that you are to attach to the Rent Control records, that is for you to determine. You will recall, however, that Miss Kellett from that office testified that the office had received a memorandum from a Mrs. Olson saying that she had sold the premises as of August to a Dr. Borja, I believe, and that the Rent Control office had not been able to locate that Dr. Borja to date, and that upon the suggestion Counsel made to the witness as to where the Rent Control office might locate this man here in the city and county of Honolulu, the witness indicated she would follow up that suggestion. I repeat, it is for you to determine how much weight you are to place upon this and any other bits of evidence. You, and you alone, are the sole [274] judges of the weight and significance of the evidence and of the credibility of the witnesses.

Over all, both sides approach one aspect of this problem from the same direction. The Government approaches it from two directions. The Government approaches the problem of the house, the real estate, as does the defendant by the testimony which he has produced, that the problem of the house has this significance, as I told you yesterday when we

were defining more specifically the meaning and significance of the term "possession": On the one hand, from its evidence, the Government would contend that if you find beyond a reasonable doubt that, regardless of who the record tenant was, the defendant was in fact the real tenant of these premises, that it may therefore be said, as a matter of law, that he had constructive possession of the contents and articles in, on, and about those premises. With the same rule of law in mind, the defendant comes forward and says Mrs. Thomas was the tenant and therefore, if there was any personal property on these premises, the indications are that she was the one who possessed the contents of these premises and the things in, on, and about them.

The second angle from which the Government approaches this problem is independent of the house and problem of constructive possession. It secondly approaches the problem directly as to these narcotics, from the standpoint of constructive possession of these narcotics separately and [275] independently from the problem of the house and would no doubt have you believe that it has satisfied you beyond a reasonable doubt that from the things that it relies upon, all put together and weighed and assessed and valued and evaluated it has proven that the defendant had knowing, conscious control and dominion and possession of these narcotics, narcotic drugs, upon the basis of which the Government contends the presumption of law that I have spoken of earlier comes into operation.

Over all, what the law is you must take from me as I give it to you, and not from the lawyers. Whether I am correct or incorrect as to what the law is is my responsibility. I believe I have given it to you correctly and clearly and simply, and that as given to you in these instructions, it should be most adequate to enable you to reach a verdict as to counts 1 and 2.

As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment, and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so [276] satisfied, you must acquit.

A form of verdict has heretofore been prepared for you, but it occurs to me that if, for example, that form of verdict does not correspond with what you gentlemen find, you may use your own form of verdict, for the reason that this form of verdict is simply prepared for your convenience, but there is no special significance to the particular form that we have given to you. In fact, you do not have to write out your verdict at all. You can announce it in open court, if you see fit. It is merely a form after all.

With this review of the law and the evidence I will conclude my remarks, unless there are any questions that you wish to ask me.

Mr. Andre.

Juryman Andre: Your Honor, no questions at this time.

The Court: Very well. Do you want to take any exceptions to anything I have said?

Mr. Soares: I think we have some exceptions.

The Court: Do you want the jury excused?

Mr. Soares: Yes.

The Court: Will the jury step out, please.

(Exit jury.)

Mr. Landau: Before I make the exceptions with reference to the Court's instructions at this time, it is [277] unquestionably understood that any exceptions we have made to previous instructions, for the reasons stated in the Court's chambers will be considered as applying to the same instructions.

The Court: Yes.

Mr. Landau: I take exception to your Honor's remarks and instructions to the jury at this time, first, because it has not in any way taken into consideration the facts and effect of the cross-examination of the Government witnesses. I mean, the Court has been completely silent on certain matters which were brought out on cross-examination which were not either cleared, or even mentioned, in the direct examination.

Second, among your Honor's list of items which the Government relied upon to prove possession and

the items which the defendant used to rebut any inference your Honor has been silent, and I know it is not deliberate, it has been completely silent about the testimony of Officer Case to the effect that he was stationed on Kalakaua Avenue at Barbecue Inn for the specific purpose of watching the defendant's residence at 408 Keanianu Street.

We also except to your Honor's remarks to the fact that neither the Government nor the defendant has produced Helen Thomas. There is no duty upon the defendant to produce any witness. The inference is that we have been remiss in our duty. Actually, it is the Government's duty.

